

Claimant's theft from the employer was not mitigated by his addiction to illegal drugs.



THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

Board of Review letterhead

## BOARD OF REVIEW DECISION

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## Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to allow benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on October 15, 2009. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued by the agency on November 28, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner reversed the agency's initial determination and allowed the claimant benefits in a decision rendered on January 7, 2010.

Benefits were allowed after the review examiner determined that mitigating circumstances entitled the claimant to benefits under G.L. c. 151A, § 25(e)(2). The Board accepted the employer's application for review and provided the parties with an opportunity to submit written reasons for agreeing or disagreeing with the review examiner's decision. Only the employer responded.

Our decision is based on our review of the entire record, including the recorded evidence and testimony from the hearing, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether the claimant's drug addiction mitigated his premeditated theft of \$1,000 of the employer's property so as to permit a conclusion that the claimant is entitled to benefits.

## Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked for the employer as a Maintenance Worker from April 26, 2005, until October 15, 2009, when he was discharged.
2. The claimant worked Tuesday to Saturday from 7 AM to 3 PM.
3. The employer discharged the claimant for allegedly engaging in theft by taking material from the employer's storage shed.
4. The claimant worked at one of the employer's maintenance depots. The employer had a locked shed at the location for storing the employer's materials. The storage shed was also under video-camera surveillance.
5. The employer had a rule prohibiting theft. The purpose of the rule was to protect the employer's assets, including its valuable materials. The rule was contained in the labor agreement between the employer and the union representing its employees, including the claimant. The union provided a copy of the labor agreement to all the employer's employees, including the claimant, at hire and whenever a new agreement went into effect. At least two other employees had violated the rule previously, and the employer had discharged both of them for a first offense.
6. The employer expected employees not to engage in theft. The employer maintained this expectation to protect its property. Written material about this expectation was distributed to all employees, including the claimant, at hire.
7. In 2006 or 2007, the claimant entered an outpatient treatment program for oxycontin and heroin addiction. The claimant informed his immediate Supervisor of his addiction, his treatment program, and the prescription drug that he was taking as part of his treatment. The claimant did not miss any work as a result of attending the outpatient program. The program included attending a weekly group meeting and submitting to a urine test every two weeks. The claimant continued in the program to the date of the hearing.
8. In August 2009, the claimant suffered a relapse in his addiction and returned to taking oxycontin and snorting heroin. The claimant did not know why this happened except that he had gotten complacent.



9. On Saturday, September 12, 2009, while at work, the claimant used a blowtorch to break the storage shed's lock, entered the storage shed, and took stainless-steel rods and nuts valued at about \$1,000. The claimant later sold these materials for cash to support his oxycontin and heroin habit. The claimant engaged in theft because he needed money to feed his addiction and did not want to get sick and go through withdrawal by trying to quit. The claimant did not care that he was stealing or that he was under video surveillance while breaking into the shed and taking the materials, because he was compelled by his addiction to raise cash for his addiction.

10. The claimant last physically worked for the employer on September 16, 2009, when he was suspended pending investigation of allegations of misconduct.

## Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for...the period of unemployment next ensuing...after the individual has left work...(2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence,...

The claimant did not deny that he planned and executed a theft of the employer's property in order to finance the acquisition of illegal drugs. The claimant argued, and the review examiner agreed, that since the claimant's misconduct was fueled by his disease of addiction, his action was not sufficiently intentional to constitute deliberate misconduct in wilful disregard of the employing unit's interest.

The critical factual issue in a deliberate misconduct case is the employee's state of mind at the time of the misconduct. Torres v. Dir. of Division of Employment Security, 387 Mass. 776, 781 (1982). To determine the employee's state of mind, the findings of fact must take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

In our view, the review examiner erred in treating the claimant's drug addiction as a mitigating factor in a discharge for theft. While the claimant's addiction to heroin and Oxycontin may have been the motivation for his theft, there was insufficient evidence that chemical impairment at the time of the theft rendered the claimant unable to form intent. Moreover, to treat drug addiction as a mitigating factor would, in our view, amount to a conclusion that the claimant's crime of theft could be excused by another course of criminal conduct: the illegal use of a drug.

We conclude as a matter of law that the claimant is not entitled to benefits, because his discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 24, 2009 and subsequent weeks, until he returns to work for eight weeks and in each of said weeks earns an amount equal to or in excess of his weekly benefit amount.

**BOSTON, MASSACHUSETTS****DATE OF MAILING - March 30, 2011**

/s/

John A. King, Esq.  
Chairman

/s/

Sandor J. Zapolin  
Member

/s/

Stephen M. Linsky, Esq.  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – April 29, 2011**

LH

Last Updated ( Friday, 16 March 2012 )